IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 7, 2007 Session

IN RE ESTATE OF RICHARD C. LANG

Appeal from the Probate Court for Sevier County
No. 02-02-1842 Jeff D. Rader, Judge

No. E2006-00279-COA-R3-CV - FILED JULY 31, 2007

This case involves a dispute in probate between Lydia Jane Woschenko ("the claimant"), who is the former spouse of Richard C. Lang ("the decedent"), and Stephanie F. Lang ("the executrix"), who is the decedent's widow and the executrix of his estate. The claimant filed a claim against the estate based upon a post-divorce agreement between her and the decedent. She seeks to recover the unpaid balance of half of the net value of the marital real property. The trial court found the agreement to be valid and awarded the claimant $72,238.86. The executrix appeals the court's award, raising issues addressing the Dead Man's Statute, the doctrine of incorporation by reference, and the equitable doctrine of laches. We modify the trial court's judgment. As modified, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Wesley M. Baker, Knoxville, Tennessee, for the appellant, Stephanie F. Lang, Executrix of the Estate of Richard C. Lang.

Charles W. Kite, Knoxville, Tennessee, for the appellee, Lydia Jane Woschenko.

OPINION

I.

The parties' divorce in 1980 dissolved a marriage of some 20 years. The decedent was considerably older than the claimant. During most of the marriage, the parties lived in a house located on approximately nine acres in Gatlinburg. The divorce judgment was entered on October

15, 1980; it incorporated the parties' Marital Dissolution Agreement ("the MDA"). With respect to the marital home and nine acres, the MDA provides as follows:

> That the house and land which they own at Route 73, Cosby Road, Gatlinburg, Tennessee 37738 will be sold and that all equity from the sale of said house will be distributed equally between the parties. That each party will pay one-half (1/2) of the mortgage payment and the note on the house, which note is secured through the Newport Savings and Loan Company. That each party will pay one-half (1/2) of the expenses incurred in maintaining the house until such time as it is sold. That each party will pay one-half (1/2) of all capital gains and other taxes on the equity which is received from the sale of the house. The house will be placed on the market on or before October 1, 1980.

The MDA also contains a provision reciting that the decedent and the claimant will equally divide a personal loan "of about $9,000" made to the decedent by Tennessee State Bank. The claimant testified that, at the time of the divorce, the decedent had colon cancer and was terminally ill. She stated that, because of the decedent's deteriorating health, she did not insist that he move out of the marital residence. The executrix disputes that the decedent was terminally ill at the time of the divorce.

The parties to this litigation stipulated to the authenticity of a written agreement between the parties ("the November agreement"). The trial court found that the November agreement was executed by the parties *after* the divorce of October 15, 1980. The evidence does not preponderate against this finding. The November agreement recites as follows:

> Pertaining to the disposition of the proceeds of the sale of the Lang property in Gatlinburg, [the claimant] agrees to accept[ ] a gross amount of $75,000.00 as her share of the proceeds. She agrees to have deducted from this amount one half of the loan at the Tennessee State Bank in the amount of $10,650.63 [this amount is struck through and the amount of "$9250.63" is handwritten above it] and one half of the mortgage loan at the Newport Federal Svgs and Ln in the amount of [ ]$6,893.28[.] *It is agreed that at the time the house is sold* [the decedent] will deduct from the net proceeds of the sale, amounts documented by receipts to compensate him for expenditures for the construction of a road to the house and for amounts expended for the maintainance [sic], repair and general improvement of the premesis [sic]. Should the net proceeds after these deductions amount to more than $150,000.00 [the decedent] agrees to share the difference equally with [the claimant], paid in cash.

(Emphasis added). About the time the parties entered into the November agreement, the claimant, by general warranty deed dated November 7, 1980, conveyed to the decedent her one-half interest in the marital home and nine acres. On November 14, 1980, the decedent sold approximately seven of the nine acres, excluding the marital home, to Charles E. Moore. The decedent's 1980 federal income tax return reflects a sales price of $50,000.

Following the execution of the November agreement, the claimant ultimately received from the decedent a gross distribution of $75,000 less half of the two outstanding debts listed in the MDA and the November agreement. The net payment to the claimant was $66,928.04. The claimant stated that, around the time of the divorce, she had obtained an appraisal in the amount of $150,000 for the nine acres, including the marital home. She testified that she believed this appraisal was low. The record also contains an appraisal obtained by the decedent dated October 6, 1980, which pegged the value of the entire property, including the marital home, at $160,000.

The claimant testified that, after the divorce, a road was built to access the two acres on which the marital home was located. This road was necessitated by the fact that the seven acres sold to Mr. Moore contained the only road to the property. In short, she testified that there was to be a "further reckoning" when the marital home was sold.

Lori Tierney, the decedent's daughter from a previous marriage, was called to testify on behalf of the executrix. Ms. Tierney testified that although she never saw the November agreement prior to her father's death, she was aware of it. Ms. Tierney stated, "I was aware that there was an agreement in what [the November agreement] is describing; that after the divorce if [the decedent] had sold the house and profited anything, that it was to be shared with [the claimant]."

The decedent died on January 29, 2002, at the age of 90. According to his will, the decedent left the marital home and two acres to his widow, *i.e.*, the executrix, whom he had married in 1985. According to an appraisal dated October 8, 2002, the marital home and remaining two acres was valued at $215,000.

The widow filed a petition to probate the decedent's will on February 1, 2002. On May 8, 2002, the claimant filed a claim against the estate for an amount not less than $75,000 based on the "Balance due from Marital Dissolution Agreement, Re: Disposition of personal residence." On June 19, 2002, the executrix filed an exception to this claim, arguing that it should be denied based upon the applicable statute of limitations and the equitable doctrine of laches.

On October 18, 2002, the trial court held a hearing on a portion of the executrix's exception. The claimant and the executrix testified briefly. On March 21, 2003, the trial court entered an order ruling that the claimant had filed a timely claim against the estate and that the MDA and the November agreement "must be construed as a whole." The court appointed a special master to hold a hearing on whether the claimant was entitled to any proceeds from the sale of the marital home and two acres.

The hearing before the special master extended over three days: June 27, 2003, July 21, 2003, and August 1, 2003. The claimant testified extensively about the circumstances surrounding the November agreement. The executrix offered extensive testimony pertaining to documented expenditures relating to the marital home incurred between the divorce in 1980 and the decedent's death in 2002. The special master filed a report on February 19, 2004. He found that "the death of the [decedent] and the resulting transfer of the house and land as a matter of law is a transfer within the meaning of the claimant's and [the decedent's] agreement." Concluding that the claimant was entitled to recover $2,695.29 from the estate, the special master's report calculated the award as follows:

> The master has reviewed the agreements of the parties and has determined that the agreements should be read together as decided by the trial court. In reading the two agreements it appears that the parties agreed that after November 7, 1980, that if the remaining property were ever sold that [the decedent] would receive credit for the expenses spent to repair, maintain and add to the general improvement of the property. The master finds these expenses to be a gross amount of $73,211.75 less the insurance proceeds of $13,602.32 or net amount of $59,609.43.
>
> The master further finds that the value of the property was $215,000. Therefore under the agreement the net expenses of $59,609.43 are added to $150,000 for a total of $209,609.43. The sum of $209,609.43 is subtracted from the value of $215,000 for a net sum of $5,390.57. Under the agreement the claimant is entitled to one-half of this amount or the sum of $2,695.29.

The "insurance proceeds of $13,602.32" refers to proceeds paid to the decedent as a result of a fire that burned a building on the premises following the divorce. Contrary to the trial court's determination as set forth herein, we hold that the insurance proceeds must be considered in ascertaining whether the claimant is entitled to additional monies as a result of the sale of the house and two acres.

On January 6, 2006, the trial court entered its judgment in which the special master's report was accepted in part and rejected in part. The judgment awarded the claimant $72,238.86 from the estate and provided, in pertinent part, as follows:

> Based upon a review of the Special Master's Report, the records and the exhibits filed by the parties, the Court overrules the Special Master in one respect. This Court does believe that the Claimant and decedent entered into an agreement to sell the marital residence and nine (9) acres. Pursuant to that agreement the property was to be sold by October 4, 1980. Subsequently, they agreed to sell seven (7) acres

for the sum of One Hundred Fifty Thousand ($150,000[.]00[ ]) Dollars. From the One Hundred Fifty Thousand ($150,000.00) Dollars mortgages and other expenses were to be paid. The net proceeds were to be divided.

The Court finds that the subsequent agreement to sell the house and remaining property must be honored pursuant to this earlier agreement. When the remaining property was to be sold, the expenses were at that point to be subtracted. The Court thus finds the One Hundred Fifty Thousand ($150,000.00) Dollars (previously divided) must be added to the remaining value of the property (being the home and two acres) in the proven amount of Two Hundred Fifteen Thousand ($215,000.00) Dollars.

This Court believes that the Special Master overlooked the agreement between the Claimant and the deceased concerning the second agreement and/or contract previously testified to. This Court having previously determined this second contract to be valid. (See order dated March 18 [sic], 2003).

In viewing the contracts as a whole, the Court finds that the One Hundred Fifty Thousand ($150,000.00) Dollars represented the value of the land when the 7 acres were sold in 1980 and must be added to the current value of the remaining property (that being the house and 2 acres being valued at Two Hundred Fifteen Thousand ($215,000.00) Dollars). The total value of the property owned by Mr. Lang and the Claimant is the amount of Three Hundred Sixty Five Thousand ($365,000.00) Dollars.

From this the Court finds the expenses (as calculated by the Special Master) One Hundred Fifty Thousand ($150,000.00) Dollars already divided by the Claimant and decedent should be deducted. This leaves a balance of Two Hundred Fifteen Thousand ($215,000.00) Dollars. The Court finds from this amount, the expenses, which are allowable, must be reduced by the amount of Seventy Thousand Five Hundred Twenty-Two Dollars and 27 Cents ($70,522.27) which the Court finds to be the correct subtotal of the allowable expenses as found by the Special Master.

The Court declines to accept the rational [sic] with regard to the insurance deduction set forth by the Special Master in his report (see Special Master's report paragraph F).

> Therefore the Court finds that the amount awarded to the Claimant shall be calculated as follows:
>
> $365,000.00 is the total amount of the property value. From that will be subtracted $150,000.00 previously paid. Also subtracted is the amount of $70,522.27. The Court therefore awards judgment to the Claimant in the amount of $72,238.86. This is one-half (1/2) the remaining amount of One Hundred Forty Four Thousand Four Hundred Seventy-Seven Dollars and 73 cents ($144,477.73).

(Paragraph numbering in original omitted). The executrix appeals this award.

II.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

III.

The executrix raises several issues on appeal. These issues present the following questions:

> 1. Did the trial court err in allowing the claimant to testify regarding the transactions between her and the decedent and statements of the decedent?
>
> 2. Did the trial court err in determining that the claimant was entitled to a recovery against the estate by virtue of her former ownership interest in the marital residential property over and above the gross distribution to her of $75,000 made during the lifetime of the decedent?

IV.

The executrix contends that the trial court erred in allowing the claimant to testify regarding transactions between her and the decedent and statements made by the decedent, all of which she argues was in contravention of the Dead Man's Statute. We agree with the executrix that the Dead Man's Statute was violated in this case.

The Dead Man's Statute, T.C.A. § 24-1-203 (2000) ("the Statute"), provides, in pertinent part, as follows:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. . . .

There have been many decisions interpreting the Statute. We will review a few of them.

In ***Brown v. Fuqua***, 9 Tenn. App. 22, 1928 WL 2168 (1928), the Court of Appeals, in a relatively early opinion, examined a predecessor — and identical — statute[1] to T.C.A. § 24-1-203. The court opined as follows:

> A party to the suit may not testify against the executor as to any transaction with or statement by the testator, unless called upon to testify, but a witness may testify as to the condition of his mind and the circumstances surrounding him when he executed the contract with the decedent, and it has also been held that the fact that one of the parties to a contract is dead furnishes no sound reason for not receiving evidence of the intent of the other party as manifested by his declarations.

Id., at *3 (citations omitted). The Court quoted, with approval, the following from Pritchard on Wills and Administrations, § 677:

> A "transaction" within the meaning of the statutes under discussion is an action participated in by witness and decedent, or something done in decedent's presence, to which, if alive, he could testify of his personal knowledge, and the term embraces every variety of affairs, the subject of negotiations, actions or contracts. It has also been said that personal transactions and communications with a person since deceased include every method by which one person can derive any impression or information from the conduct, condition or language of another.

Id., at *4 (citation omitted). The ***Brown*** Court noted that "where such testimony is admitted, over defendant's objection, he may cross-examine the witness without waiving his objection, and by doing so he does not thereby call upon the witness to testify and the testimony is not rendered

[1] Shannon's Code, § 5598.

admissible." ***Id.*** (citations omitted). *See also* ***Nabors v. Gearhiser***, 525 S.W.2d 145, 148 (Tenn. 1975); ***Gulf Refining Co. v. Frazier***, 19 Tenn. App. 76, 83 S.W.2d 285, 299 (1934).

The rationale underlying the Statute

> [i]s to prevent the living from testifying against the dead. Death having silenced the one, the law silences the other, the theory being that both or neither must be competent to testify.

Kurn v. Weaver, 25 Tenn. App. 556, 580, 161 S.W.2d 1005, 1020 (1940) (citations omitted). The Statute is strictly construed against the exclusion of testimony. ***Baker v. Baker***, 24 Tenn. App. 220, 142 S.W.2d 737, 744 (1940).

One timely objection to a line of questioning pertaining to inadmissible testimony is sufficient; repetitious objections are not required. ***Gulf Refining Co.***, 83 S.W.2d at 299. ("One ruling on one question is enough, and a repetition of similar exceptions is not to be required, if, indeed, to be tolerated.") (citations omitted).

The meaning of a "transaction with" the decedent under another predecessor, and identical, statute[2] to T.C.A. § 24-1-203 was further refined in ***Newman v. Tipton***, 191 Tenn. 461, 466, 234 S.W.2d 994, 996 (1950):

> But has Annie Tipton testified to any fact that could be fairly considered as a "transaction" with Mrs. Newman, now deceased, and who owned the property at the time of the accident? The question cannot be answered by giving a dictionary definition of what constitutes a transaction. Counsel for petitioner cites numerous decisions and authorities undertaking to define a "transaction" within the purview of the statute. Thus in Waggoner v. Dorris, 17 Tenn. App. 420, 68 S.W.2d 142, it was said: "Transactions with intexecutrix, as to which witness cannot testify, refer to things done in intexecutrix's presence, to which he might testify of his personal knowledge, if alive, not to transactions out of his hearing and presence, though affecting liability of his executrix." Also in Bankers Trust Company v. Bank of Rockville Center Trust Co., 114 N.J.Eq. 391, 168 A. 733, 739, 89 A.L.R. 697, the Court uses the following language: "The test laid down for ascertaining what is a 'transaction with' the deceased, within the intendment of the statute, is 'to inquire whether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge.'. . ."

[2] 1932 Code, § 9780.

It is clear that not every violation of the Statute requires reversal. While a claimant "may not testify as to any transaction with or statement by the testator and the admission of such testimony is error, such error is harmless if the judgment is supported by evidence other than such incompetent evidence and there is no material evidence as to the contrary." ***Durham v. Webb***, 46 Tenn. App. 429, 440, 330 S.W.2d 355, 359 (1959) (citation omitted); *see also* Tenn. R. App. P. 36(a).

The executrix argues that the trial court improperly relied upon testimony given in violation of the Statute in making its award to the claimant. During the October 18, 2002, hearing to determine the timeliness of the claim, the executrix, then represented by different counsel, objected to the claimant's attempt to state what the parties intended to achieve by the execution of the November agreement. The objection was based upon the Statute. In response to the objection, the trial court ruled:

> She can testify about the execution of the documents and how that occurred, but she can't testify about her understanding. I don't think she -- because it's going to require that there be testimony about the conversations. She can testify about -- in other words, the documents, themselves, speak for themselves. The extent to which you make a claim that they would somewhat be ambiguous or something ordinarily could be -- you could supplement the documents by testimony. But in this case you can't because it's barred by the Dead Man statute. . . . So she can testify about the way this happened or how this transaction occurred, or whatever. But as far as her testifying about some understanding outside this document or these documents that have been previously marked, I don't think she can do that.

The trial court's ruling is somewhat confusing. While recognizing the general import of the Statute, the trial court opined that the claimant could "testify about the execution [of the November agreement] and how that occurred." This arguably opened the door to the claimant's later testimony regarding dealings and conversations with the decedent, testimony that clearly runs afoul of the Statute. Thus, while appearing to sustain the executrix's objection in general, the trial court seems to have specifically allowed the receipt into evidence of testimony at odds with the restrictions of the Statute.

In any event, at numerous times during the various hearings in this matter, the executrix objected to the claimant's attempt to testify to transactions with and statements by the decedent. We have reviewed the record and have reached two very firm conclusions: first, the claimant was allowed to give testimony that is contrary to the Statute; and, second, the executrix very clearly made

known to the court that she objected to this testimony.[3] While the executrix did not object every time such testimony was sought to be elicited, this was not necessary. ***Gulf Refining Co.***, 83 S.W.2d at 299. We agree with the executrix that all of the testimony that violated the Statute must be disregarded. We hold, however, that, even in the absence of this offending testimony, there is sufficient evidence in the record to establish the intent of the parties with respect to the November agreement. Therefore, admission of the evidence in violation of the Statute was harmless and does not form a basis for reversing the judgment of the trial court. *See* ***Durham***, 330 S.W.2d at 359; Tenn. R. App. P. 36(a).

V.

A.

The executrix contends that the trial court erred in determining that the claimant was entitled to a recovery against the executrix by virtue of her former ownership interest in the marital residence over and above the net payment of $66,928.04 made during the lifetime of the decedent. We find no error in the trial court's decision to award the claimant additional compensation; but we modify the amount of the award.

B.

With respect to this issue, the executrix first argues that the trial court "erred in ruling that the [MDA] and the November [a]greement were to be construed as a whole thus implicitly applying the doctrine of incorporation by reference." The executrix maintains that neither the MDA nor the final divorce decree made reference to a subsequent agreement being incorporated, as required by the doctrine. The executrix apparently contends that construing the two agreements together results in the claimant recovering twice for her half of the marital home and two acres, having already received a gross amount of $75,000 as her half of the entire property value at the time of divorce.

The executrix's underlying argument on this point is based on a false premise. It is true that the trial court ruled that the MDA and the November agreement "must be construed as a whole." However, this does not mean that the November agreement was incorporated by reference into the MDA. The two agreements must be construed as a whole because it is necessary to look to the language of the MDA to fully understand the intention of the parties in entering into the November agreement. As we understand the November agreement, the parties agreed, after their divorce, that they would proceed, *at that time*, on the assumption that the whole of the marital residential property was worth $150,000, but further agreed that they would, in any event, equally divide all of the proceeds from the sale of the property.

[3] We recognize that the executrix cross examined the claimant about the testimony that contravened the Statute. Her examination does not constitute a waiver of her objection. *See* ***Brown***, 1928 WL 2168, at *4.

We find that the evidence does not preponderate against the trial court's conclusion that the November agreement was a valid post-divorce agreement between the claimant and the decedent such that the claimant would potentially be entitled to receive a portion of the proceeds from the sale of the marital home and the remaining two acres. To the extent that the executrix argues in its reply brief that the circumstances surrounding the execution and dating of the November agreement "call[] into serious question the validity of the agreement," we simply note that the executrix stipulated at trial that the parties entered into the agreement. *See* ***Estate of Schultz v. Munford, Inc.***, 650 S.W.2d 37, 40 (Tenn. Ct. App. 1982) ("It is the rule in this jurisdiction that a plaintiff cannot take a position on appeal inconsistent with that taken in the trial of the case. . . .") (citations omitted). Furthermore, the executrix's brief seems to accept that the agreement was reached in November 1980. The executrix will not be allowed to deviate from her position at trial and her tacit acknowledgment in her brief as to the date of execution of the November agreement.

We go one step further than the trial court and classify the November agreement as a modification of the MDA. The basic principles of contract modification are well stated in ***CRT, Custom Prods., Inc. v. Bennett***, No. 01A01-9703-CH-00125, 1997 WL 692970 (Tenn. Ct. App. M.S., filed November 7, 1997):

> The existence of a modification to a contract must be established the same way as establishing any other contract. The party seeking to make out a prima facie case that a contract has been modified must prove the contracting parties' mutual assent to the modification, and must[ ] prove that the modification was supported by adequate consideration. If the modification is in writing signed by the party to be charged, the writing itself constitutes prima facie evidence of consideration.

Id., at *4 (citations omitted). Furthermore, the general rule in contract law is that the last agreement concerning the same subject matter that has been signed by the parties supersedes all former agreements, and the last contract is the one that embodies the true agreement. ***Bringhurst v. Tual***, 598 S.W.2d 620, 622 (Tenn. Ct. App. 1980). Applying these principles to the facts in the instant case, it is clear that the claimant and the decedent modified the MDA when they entered into the November agreement, which is the final document embodying their agreement. The requirements of mutual assent and consideration exist in the parties' signatures and exchange of promises.

C.

The executrix also challenges the trial court's award to the claimant by arguing that the trial court erred in determining that the claim was not barred by laches. The executrix argues that the claimant has engaged in a "calculated delay" by waiting over 22 years to raise a claim for half of the value of the marital home and two acres. According to the executrix, it has been "severely prejudiced" by this delay, and the equitable doctrine of laches should bar any recovery.

"The two essential elements of laches are negligence and unexcused delay of the complainant in asserting his alleged claim. . . ." ***Consumer Credit Union v. Hite***, 801 S.W.2d 822, 825 (Tenn. Ct. App. 1990). Laches is applicable only "where the party invoking it has been prejudiced by the delay." ***Archer v. Archer***, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995). We agree with the trial court that the doctrine of laches is not implicated by the facts of this case. The claimant was not tardy in bringing her claim against the estate. The decedent remained in the marital home until his death on January 29, 2002, and the claimant filed her claim against the estate on May 8, 2002. According to the terms of the November agreement, it was only when there was a sale of the marital home and remaining property that the claimant had any right to share in the proceeds and there was no stated time limitation relating to when the marital home had to be sold. The special master found that the transfer of the marital home and two acres to the widow at the time of the decedent's death constituted a sale or transfer within the meaning of the November agreement. The executrix has not challenged this ruling. Moreover, even if the claimant had waited an unexcusably long time to file the claim, the executrix has not demonstrated how the estate was prejudiced by the delay. In fact, if we did not give the claimant her day of "further reckoning," the widow, as the beneficiary of the property under the decedent's will, would receive a significant windfall in this case. Having found no unexcusable delay by the claimant and no prejudice to the estate, we find this issue to be without merit.

D.

Finally, in evaluating the trial court's award in this case, we find it necessary to modify the judgment because the evidence preponderates against the calculations reached by both the special master and the trial court. As previously noted, the special master awarded the claimant $2,695.29, while the trial court ultimately awarded the claimant $72,238.86. In our opinion, neither the special master nor the trial court made a proper accounting of the total net value of the house and nine acres. At the heart of their error was their belief that the gross allocation to the claimant of $75,000 was because the sale of the seven acres to Mr. Moore was for $150,000. On the contrary, the evidence clearly preponderates that this sale was for $50,000. We hold that the evidence reflects that the payment to the claimant was based upon the appraisal of $150,000 for the whole tract, including the house. The November agreement set $150,000 as the "floor" of the value of the whole tract. As a part of the enticement to the claimant to sign the November agreement was the decedent's willingness to pay her half of this "floor" figure while he remained in the marital residence.

In determining the parties' intention with respect to the November agreement, we have considered (a) the November agreement and (b) the MDA, along with certain established facts: (1) the entire nine acres was not "placed on the market on or before October 1, 1980" as required by the terms of the MDA; (2) following the parties' divorce, the decedent lived on the property for the next 21 years plus, *i.e.*, until his death on January 29, 2002; (3) by deed dated November 7, 1980, the claimant conveyed her one-half interest in the nine acres to the decedent; (4) on November 14, 1980, the decedent sold seven of the nine acres to Mr. Moore; (5) according to the decedent's 1980 tax

return and a document in his handwriting[4], this sale was for the gross amount of $50,000; and (6) at some unspecified time after the November agreement, the decedent paid the claimant $66,928.04, an amount computed in strict compliance with the November agreement, *i.e.*,

50% of assumed value of whole	$75,000.00
Less: Half of 2 loans	8,071.96
Amount paid to claimant	$66,928.04

As can be seen, we are focused on the language of the critical November agreement; the language in the MDA dealing with the same subject, *i.e.*, the marital real property; and the conduct of the parties following the execution of the November agreement. In interpreting an agreement, it is permissible to look at how the parties actually operated under that agreement. ***Galleria Assocs., L.P. v. Mogk***, 34 S.W.3d 874, 877 (Tenn. Ct. App. 2000). What we have not considered is any of the claimant's testimony regarding her "transaction[s] with" the decedent or "statement[s] by" him. *See* T.C.A. § 24-1-203.

From all of the above, we find that certain aspects of the parties' intention are clear: (1) instead of selling all of the property immediately, as called for in the MDA, the parties agreed (a) that the house and two acres would not be sold but rather would be exclusively occupied by the decedent for an indefinite period of time; and (b) that the parties would proceed *as if the entire tract was worth $150,000*, with the decedent paying the claimant her assumed half of the value or $75,000, less certain specified deductions; and (2) that, when the remainder of the property was sold, and assuming that the gross proceeds from all of the property brought more than $150,000, the claimant would participate equally in the excess over that figure.

The November agreement does not specify whether the subject property, *i.e.*, the house and nine acres was to be sold as a whole or in some other manner. It goes without saying that there is nothing in that document that *prohibits* a piecemeal selling of the property. The fact that, shortly after the execution of the November agreement the decedent sold a *portion* of the property with no objection from the claimant, is strong evidence that such a sale was not inconsistent with the parties' thinking at the time the November agreement was executed.

We do not believe that the sale of the seven acres was directly related to the payment to the claimant of her net entitlement of $66,928.04 other than providing the decedent with a source of

---

[4]The decedent's document states, in part, as follows:

> I borrowed $30,000 at bank
> Collected 50 M less Exp for land
> Gave Jane $75,000
> Less 1/2 Mtg 3,446.64
> Less Bk Loan 4,625.31

some of the money to fund that obligation.[5] As previously noted, the only evidence in the record pertaining to the consideration paid by Mr. Moore comes from the decedent's 1980 federal income tax return and his handwritten notes reflecting a price of $50,000. Thus, the preponderance of the evidence is that the decedent received $50,000 in exchange for his conveyance of the seven acres.

What is clear to us is that the November agreement and the MDA have one thing in common: when the property was sold, the claimant was to receive half of the net proceeds. In order to make the necessary computation, we start with what the nine-acre tract, including the house, brought by way of gross dollars. To get this amount, we combine the $50,000 realized from the sale of the seven acres with the value of the transfer to the widow of $215,000. We note in passing that neither party challenges, legally or as a factual matter, the special master's conclusion, adopted by the trial court, that the transfer to the widow of the two acres with the house was a "sale" under the November agreement. Since the claimant has already been compensated for her share of the assumed value of $150,000, we have deducted the $150,000 from the combined amount of $265,000 ($50,000 plus $215,000) leaving $115,000 of gross proceeds to be accounted for. We illustrate the proper calculation of the final award to the claimant as follows:

Gross proceeds from the sale of 7 acres		$ 50,000.00
Assumed value of transfer to widow of House and 2 acres		215,000.00
		$265,000.00
Portion of total value already distributed		<150,000.00>
Value remaining to be accounted for		$115,000.00
Less: Expenditures by Mr. Lang	$70,522.27	
Credit for insurance proceeds	<13,602.32>	<56,919.95>
Net proceeds not yet distributed		$ 58,080.05
50% of undistributed net proceeds		$ 29,040.03

Under the above calculation, the claimant receives a total of $95,968.07 ($66,928.04 + $29,040.03). When this amount is doubled, we have a total of $191,936.14. This latter figure is the total of the net value of the whole property as illustrated below:

Gross proceeds from sale of 7 acres	$ 50,000.00
Assumed value of transfer to widow	215,000.00
	$265,000.00

[5]The document in the record in the decedent's handwriting supports this. That document indicates that the decedent borrowed $30,000 to help fund the payment to the claimant.

Less:

Debt to Tennessee State Bank	$ 9,250.63	
Debt to Newport Federal	6,893.28	
Expenditures by Mr. Lang	70,522.27	
	$86,666.18	
Less: Fire ins. proceeds	< 13,602.32>	73,063.86
		$191,936.14

Under this calculation, the decedent and his estate receives one-half of the net value of the whole tract and the claimant receives the other half. This was the intention of the parties as reflected in their November agreement.

VI.

The judgment of the trial court is modified to award the claimant, Lydia Jane Woschenko, $29,040.03. As modified, the judgment is affirmed. This case is remanded to the trial court for enforcement of the modified judgment and for the collection of costs assessed below, all pursuant to applicable law. We tax the costs on appeal to the appellee, Lydia Jane Woschenko.

_____

CHARLES D. SUSANO, JR., JUDGE